Sri Jeluda Sdn Bhd v Pentalink Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–870 OF 2006
ZALEHA ZAHARI, KN SEGARA AND AHMAD MAAROP JJCA
7 MARCH 2008

Companies and Corporations — Winding up — Appeal against winding up — Petition based on summary judgment — Whether bona fide dispute of debt — Whether final judgment — Whether trial judge misdirected himself in making winding up order

Companies and Corporations — Winding up — Inability to pay debts — Demand under s 218 of the Companies Act 1965 — Whether presumption of insolvency arose upon lapse of 21 days — Whether presumption rebutted — Whether company ought to be wound up

Companies and Corporations — Winding up — Stay of proceedings — Application under s 222 of the Companies Act 1965 — Whether court empowered to order stay of winding up proceeding

On 7 July 2005, Pentalink Sdn Bhd ('the respondent') obtained a summary judgment against the appellant, Sri Jeluda Sdn Bhd and 5 other defendants for the sum of RM770,000 together with interest at 8% per annum and costs. On 25 August 2005, the respondent served on the appellant a notice pursuant to s 218 of the Companies Act 1965 ('the Act'), demanding the payment of RM812,191.78 being the judgment sum together with interest that stood unsatisfied as on that date. Upon the lapse of 21 days and there was no repayment of the judgment sum or any move for a settlement by the appellant, the respondent filed a petition to wind up the appellant at the High Court on 5 October 2005. The petition together with the affidavit verifying the petition was served on the appellant on 13 October 2005. Thereafter, the deputy registrar of the High Court issued a certificate certifying that all the requirements under r 32(1) of the Companies Winding Up Rules 1972 had been complied with. On 7 April 2006, the appellant filed a notice to appear at the hearing of the petition and filed, on the same day, a notice of motion for an order that the hearing of the petition be stayed pursuant to s 222 of the Act. The High Court heard the respondent's petition and the appellant's motion after which the appellant's motion was dismissed

and ordered to be wound up. Hence this appeal, in which, the appellant submitted that under s 222 of the Act, the court hearing the petition could order a stay of the hearing. The appellant relied on the cases of *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437 ('*Solid Kitchen*'s case') and *Public Bank Bhd v Muhibbah Meridian Sdn Bhd* [2001] 1 MLJ 31 ('*Public Bank*'s case'), which were both decided by the same High Court judge, for this proposition. In both cases the judge granted a stay of the winding up petition, pending the disposal of an appeal against the order of the summary judgment granted against the respondents. However, the respondent submitted that the High Court judge was right in dismissing the appellant's application for a stay because under s 222 of the Act, the court was only empowered to stay other proceedings pending against a company, which was in the process of being wound up, but not the winding up proceeding against the company. The issues before the court were whether s 222 of the Act empowered the court to order a stay of the hearing of the winding up petition and whether the High Court judge was right to order the winding up of the appellant in the circumstances of the case.

Held, dismissing the appeal with costs:

(1) In the *Solid Kitchen*'s case and the later the *Public Bank*'s case, no reason was given by the judge to support his conclusion that 'the stay of winding up petition is specifically provided for under s 222 of the Act'. Moreover, such a conclusion seemed to be against the intention of the legislature in enacting s 222 of the Act (see para 5 & 9); *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437 and *Public Bank Bhd v Muhibbah Meridian Sdn Bhd* [2001] 1 MLJ 31 referred.

(2) What may be applied for and ordered under s 222 of the Act is, a stay of further proceedings in the action or proceeding that is also pending, not further proceedings in the winding up petition in question. The use of the words, 'where any action or proceeding against the company is pending', before the words 'apply to the court', and the use of the words 'further proceedings in the action or proceeding' after the word 'restrain' in s 222 of the Act clearly evinced the intention of the Legislature to give the court the power to stay further proceedings in the action or proceeding (other than) the hearing of the winding up petition in question which was pending before the court (see paras 11 & 12); *Shing Hup Hin Construction Sdn Bhd v General Soil Engineering Sdn Bhd* [1999] 1 MLJ 167 followed.

(3) It was clear that the purpose of the power of stay under s 222 of the Act was to enable the court to ensure that no creditor should gain priority over others of his class. This approach, which was intended to prevent a scramble by the creditors while the court was considering whether to

wind up the company or not, again supported the fact that s 222 of the Act only gave the court the power to stay further proceedings in the action or proceedings other than the hearing of the winding up petition pending before the court (see para 14).

(4) The trial judge had not misdirected himself when he held that the summary judgment, which was the basis for the petition for winding up, remained a regular and enforceable judgment until the court set it aside. Therefore, the fact that the appellant might have filed an appeal against that judgment did not establish that the debt was bona fide disputed. In addition the trial judge was right to hold that the appellant couldn't go behind the summary judgment and resubmit that there were triable issues in the respondent's claim. The court in which the winding up petition was filed should not go behind the judgment unless there was evidence to show that the judgment was obtained by fraud or collusion which was not the case in the instant appeal (see paras 27–28).

(5) When the appellant was unable to pay the respondent the judgment sum demanded under s 218 notice after the lapse of 21 days, the presumption of insolvency arose and it was for the appellant to prove that it was able to pay its debt. However, the appellant was unable to rebut the presumption and prove that it was able to pay its debt. Instead, according to the appeal record, the appellant admitted that the money in its office account, as shown in the statement of account, belonged to the *Jabatan Pembangunan Koperasi Malaysia*. Thus, it could not use that sum of money to satisfy the court that it was commercially solvent (see paras 32 & 34).

[Bahasa Malaysia summary

Pada 7 Julai 2005, Pentalink Sdn Bhd ('responden') memperolehi penghakiman terus terhadap perayu, Sri Jeluda Sdn Bhd dan lima defendan yang lain untuk wang sejumlah RM770,000 bersama dengan faedah pada kadar 8% setahun dan kos. Pada 25 Oktober 2005, responden menyerahkan kepada perayu notis di bawah s 218 Akta Syarikat 1965 ('Akta tersebut'), menuntut pembayaran RM812,191.78 sebagai jumlah penghakiman bersama dengan faedah yang masih belum dijelaskan pada tarikh tersebut. Selepas tamat tempoh 21 hari dan tiada pembayaran balik jumlah penghakiman atau sebarang tindakan untuk penyelesaian oleh perayu, responden memfailkan petisyen untuk menggulung perayu di Mahkamah Tinggi pada 5 Oktober 2005. Petisyen tersebut bersama dengan afidavit menentusahkan petisyen telah diserahkan kepada perayu pada 13 Oktober 2005. Kemudian, timbalan pendaftar Mahkamah Tinggi mengeluarkan sijil mengesahkan bahawa semua keperluan di bawah k 32(1) Kaedah-Kaedah

(Penggulungan) Syarikat 1972 telah dipatuhi. Pada 7 April 2006, perayu memfailkan notis untuk menghadiri perbicaraan petisyen dan memfailkan, pada hari yang sama, notis usul untuk perintah bahawa perbicaraan petisyen tersebut digantung menurut s 222 Akta tersebut. Mahkamah Tinggi mendengar petisyen responden dan usul perayu dan selepas itu usul perayu ditolak dan diperintahkan untuk digulungkan. Maka rayuan ini, di mana perayu menghujah bahawa di bawah s 222 Akta tersebut, mahkamah yang mendengar petisyen boleh memberikan perintah penggantungan perbicaraan tersebut. Perayu menyandar ke atas kes-kes *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437 ('*Solid Kitchen*') dan *Public Bank Bhd v Muhibbah Meridian Sdn Bhd* [2001] 1 MLJ 31 ('*Public Bank*'), yang kedua-duanya diputuskan oleh hakim Mahkamah Tinggi yang sama, bagi kenyataan ini. Di dalam kedua-dua kes tersebut hakim membenarkan penggantungan petisyen penggulungan sementara menunggu pemutusan rayuan terhadap perintah penghakiman terus yang diberikan terhadap responden-responden. Walau bagaimanapun, responden menghujah bahawa hakim Mahkamah Tinggi betul dalam menolak permohonan perayu untuk penggantungan kerana di bawah s 222 Akta tersebut, mahkamah hanya mempunyai kuasa untuk menggantung prosiding-prosiding lain yang belum selesai terhadap syarikat, yang dalam proses penggulungan, tetapi bukan prosiding penggulungan terhadap syarikat tersebut. Isu-isu di hadapan mahkamah adalah sama ada s 222 Akta tersebut memberikan kuasa kepada mahkamah untuk memerintahkan penggantungan perbicaraan petisyen penggulungan dan sama ada hakim Mahkamah Tinggi betul dalam memberikan perintah menggulung perayu dalan hal keadaan kes tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Di dalam kes *Solid Kitchen* dan selepas itu kes *Public Bank*, tiada alasan diberikan oleh hakim untuk menyokong keputusannya bahawa 'the stay of winding up petition is specifically provided for under s 222 of the Act '. Tambahan, keputusan yang sedemikian jelas bertentangan dengan hasrat Perundangan dalam menggubal s 222 Akta tersebut (lihat perenggan 5 & 9); *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437 dan *Public Bank Bhd v Muhibbah Meridian Sdn Bhd* [2001] 1 MLJ 31 dirujuk.

(2) Apa yang boleh dipohon dan diperintahkan di bawah s 222 ialah, penggantungan prosiding lanjut dalam tindakan tersebut atau prosiding yang juga belum selesai, bukan prosiding lanjut di dalam petisyen penggulungan yang dipersoalkan. Penggunaan perkataan-perkataan 'where any action or proceeding against the company is pending', sebelum perkataan-perkataan 'apply to the court', dan penggunaan perkataan-perkataan 'further proceedings in the action or proceeding'

selepas perkataan 'restrain' di dalam s 222 Akta tersebut jelas memperlihatkan hasrat Perundangan untuk memberikan mahkamah kuasa untuk menggantung prosiding lanjut di dalam tindakan atau prosiding (selain daripada) perbicaraan petisyen penggulungan dalam persoalan yang masih belum selesai di mahkamah (lihat perenggan 11 & 12); *Shing Hup Hin Construction Sdn Bhd v General Soil Engineering Sdn Bhd* [1999] 1 MLJ 167 diikut.

(3) Ia jelas bahawa tujuan kuasa penggantungan di bawah s 222 Akta tersebut adalah untuk membolehkan mahkamah memastikan bahawa tiada pemiutang yang boleh mendapat keutamaan daripada yang lain dalam kelas yang sama. Pendekatan ini, yang bermaksud untuk menghalang perebutan di kalangan pemiutang sementara mahkamah sedang mempertimbangkan sama ada hendak menggulung syarikat tersebut atau tidak, sekali lagi disokong oleh fakta bahawa s 222 Akta tersebut hanya memberikan mahkamah kuasa untuk menggantung prosiding lanjut di dalam tindakan atau prosiding-prosiding selain daripada perbicaraan petisyen penggulungan yang masih belum selesai di hadapan mahkamah (lihat perenggan 14).

(4) Hakim bicara tidak tersalah arah dirinya apabila beliau memutuskan bahawa penghakiman terus, yang menjadi asas petisyen penggulungan tersebut, tetap mengikut aturan dan penghakiman yang boleh dilaksanakan sehingga mahkamah mengenepikannya. Oleh itu, fakta bahawa perayu mungkin telah memfailkan rayuan terhadap penghakiman tersebut tidak membuktikan bahawa hutang masih dipertikaikan secara bona fide. Tambahan, hakim bicara adalah betul dalam memutuskan bahawa perayu tidak boleh mempersoalkan penghakiman terus tersebut dan menghujah semula bahawa terdapat isu-isu yang boleh dibicarakan di dalam tuntutan responden. Mahkamah di mana petisyen penggulungan difailkan tidak boleh mempersoalkan penghakiman tersebut kecuali terdapat keterangan untuk menunjukkan bahawa penghakiman tersebut diperolehi melalui fraud atau pakatan sulit yang bukan apa yang terjadi di dalam rayuan ini (lihat perenggan 27–28).

(5) Apabila perayu tidak boleh membayar kepada responden jumlah penghakiman yang dituntut di bawah notis s 218 selepas tamat tempoh 21 hari, anggapan ketaksolvenan berbangkit dan ia adalah untuk perayu membuktikan bahawa ia boleh membayar hutangnya. Walau bagaimanapun, perayu tidak boleh mematahkah anggapan tersebut dan membuktikan bahawa ia boleh membayar hutangnya. Sebaliknya, menurut rekod rayuan, perayu mengakui bahawa wang di dalam akaun pejabatnya, seperti yang ditunjukkan di dalam penyata akaunnya, adalah milik Jabatan Pembangunan Koperasi Malaysia. Oleh itu, ia

A tidak boleh menggunakan jumlah wang tersebut untuk memuaskan mahkamah bahawa ia secara komersial, solven (lihat perenggan 32 & 34).]

Notes

B For cases on appeal against winding up, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 982–991.

For cases on inability to pay debts, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1081–1142.

For cases on stay of proceedings, see 3(1) *Mallal's Digest* (4th Ed, 2006
C Reissue) paras 1543–1560.

Cases referred to

Banfoong Sydney (JM) Sdn Bhd v MIFC Credit & Leasing Sdn Bhd [1990] 2 MLJ 120 (refd)

D *Bowkett v Fullers United Electric Works Ltd* [1923] 1 KB 160 (refd)

Dynamics Corporation of America, Re [1972] 3 All ER 1046 (refd)

Harper Trading (M) Sdn Bhd v David Distribution Sdn Bhd [2000] 5 MLJ 334 (refd)

Public Bank Bhd v Muhibbah Meridian Sdn Bhd [2001] 1 MLJ 31 (refd)

E *Quantum Far East (M) Sdn Bhd v Kayla Beverly Hills Malaysia Sdn Bhd* [2004] 7 MLJ 507 (refd)

Shing Hin Hup Construction Sdn Bhd v General Soil Engineering Sdn Bhd [1999] 1 MLJ 167 (folld)

Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd [1998] 6 MLJ 437 (refd)

F *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313 (refd)

Legislation referred to

Companies Winding Up Rules 1972 r 32(1)

G Companies Act 1965 ss 218(1)(e), 222

English Companies Act 1948 ss 226(b), 276(1)

English Companies (Consolidation) Act 1908 s 140

Housing Developers (Housing Development Account) Regulations 1991

Rules of the High Court 1965 O 45

H *(Darshan Singh & Co) for the appellant/defendants.*
(M Kanesan & Associates) for the respondent/plaintiff.
(Insolvency Department Malaysia, Pulau Pinang Branch) official liquidator.

Ahmad Maarop JCA (delivering judgment of the court):

I THE FACTS OF THE CASE

[1] The brief facts of the case are these. On 7 July 2005, the petitioner (respondent in this appeal) obtained a summary judgment against the

respondent (appellant this appeal) and five other defendants for the sum of RM770,000 together with interest at 8% per annum from 18 December 2004 until full satisfaction and costs, in Pulau Pinang High Court Civil Suit No 22–48 of 2005. On 25 August 2005 the judgment sum together with interest stood at RM812,191.78.

[2] On 25 August 2005, the respondent served on the appellant a notice pursuant to s 218 of the Companies Act 1965 ('the Act'), demanding payment of RM812,191.78 within 21 days from the date of service of the notice. The said period of 21 days lapsed and the appellant did pay not pay the sum demanded. The respondent did not receive any payment from the appellant. On 5 October 2005, the respondent filed the petition (encl 1) to wind up the appellant. The petition and the affidavit verifying the petition were served on the appellant on 13 October 2005. The deputy registrar of the High Court issued a certificate dated 2 March 2006, certifying that all of the requirements under r 32(1) of the Companies Winding Up Rules 1972 had been complied with. The appellant gave a notice dated 7 April 2006, of its intention to appear in the hearing of the petition. On the same date (7 April 2006), the appellant filed the notice of motion in encl 12, applying for an order that the hearing of the petition be stayed pursuant to s 222 of the Act. Enclosure 12 and encl 1 were fixed for hearing on 21 June 2006. On 21 June 2006 the High Court heard arguments by the parties and adjourned the hearing to 13 July 2006. On that date the learned judge dismissed the application in encl 12 and ordered that the appellant be wound up.

[3] Being dissatisfied, the appellant filed an appeal against the aforesaid decision of the learned judge. Hence this appeal before us.

DECISION OF THE COURT

[4] Section 222 of the Companies Act 1965 provides:

> At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

[5] Learned counsel for the appellant submitted that under s 222 of the Act, the winding up court could stay the hearing of the winding up petition. A number of authorities were cited by him. However, we find that only *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437 and *Public*

Bank Bhd v Muhibbah Meridian Sdn Bhd [2001] 1 MLJ 31 are relevant to the issue under consideration. Both these cases were decided by the same judge in the High Court in Kuala Lumpur.

[6] Learned counsel for the respondent submitted that the learned judge was right in dismissing the appellant's application in encl 12 because under s 222 of the Act, the court was only empowered to stay other proceedings pending against a company which was in the process of being wound up, not the winding up proceeding against the company. In support he cited *Shing Hin Hup Construction Sdn Bhd v General Soil Engineering Sdn Bhd* [1999] 1 MLJ 167, *Harper Trading (M) Sdn Bhd v David Distribution Sdn Bhd* [2000] 5 MLJ 334 and *Quantum Far East (M) Sdn Bhd v Kayla Beverly Hills Malaysia Sdn Bhd* [2004] 7 MLJ 507.

[7] The issues before us are as follows:

(1) whether s 222 of the Act empowered the court to order the stay of the hearing of the winding up petition in encl 1; and

(2) whether the learned judge of the High Court was right in ordering the winding up of the appellant in the circumstances of this case.

Whether s 222 of the Act empowered the court to order the stay of winding up petition

[8] In *Solid Kitchen*, the petitioner had obtained a summary judgment against the respondent on 17 April 1998 in the Kuala Lumpur Sessions Court in Summon No 7–52–4945 of 1997. The respondent filed a notice of appeal to the High Court vide Civil Appeal No RI–12–194 of 1998 and the appeal was pending. the respondent then filed an application for the stay of execution of the judgment and that application was also pending in the sessions court. In the meantime, relying of the summary judgment obtained in the sessions court, the petitioner issued a statutory notice under s 218 of the Act, demanding the respondent to pay the judgment sum within 21 days from the service of the notice. Immediately upon the expiry of the 21 day period, the petitioner filed the petition for winding up. In response, the respondent applied for a court order to stay all further proceeding in the winding up petition, pending the hearing of the respondent's appeal in the Civil Appeal No RI-12–194 of 1998. In his judgment the learned High Court judge held that:

> To my mind, such an application for the stay of winding up petition is specifically provided for under s 222 of the Companies Act 1965, which reads —

> At any time after the presentation of winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit.
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> (Emphasis added.)

Presentation of winding up petitions are not a means of execution proceedings envisaged under O 45 of the Rules of the High Court, but are independent proceedings taken under s 218(1)(e) of the Companies Act 1965, by proving the establishment of a 'debt due and payable'; in that it must be due at the time of the demand; and made enforceable by threat of winding up proceedings. But where the debt is disputed, as in this case, being a debt on a judgment subject of a further appeal to a superior court, it certainly cannot be said to be an undisputed debt; and the petitioner cannot at this stage claim to be a creditor of the respondent until that judgment obtained in his favour has become final and conclusive upon the disposal of the appeal. Until then, the debt is sub-judice, and any presentation of the petition in the circumstances is an abuse of the process of court, and the court will lend its willing hands to restrain the petitioner from presenting or proceeding of the petition under s 222 of the said Act.

[9] Similar circumstances arose in *Public Bank Bhd v Muhibbah Meridian* before the same judge. At the hearing of the petition, and upon considering the written submissions of the petitioners, the learned judge, applying his own decision in *Solid Kitchen*, granted a stay of proceeding of the winding up petition, pending the disposal of the appeal [against the order of summary judgment made against the respondent]. He held that:

> This section grants the Commercial Court, a court of co-ordinate jurisdiction in the High Court, the unfettered discretion; and an unlimited jurisdiction to grant a stay, and or to restrain the petitioner from presenting such a petition, especially so, if the court was satisfied that the debt was still a contentious civil matter, subjudice and pende lite. After all the courts administer justice and the word 'justice' is not 'just-ice'; but a load of unfettered discretions available to the presiding judge to exercise the balance of convenience in a manner applicable to each and every circumstance; as may be necessary for the purpose of justice!

[10] The learned judge did not explain how s 222 of the Act granted 'the commercial court — the unfettered discretion, and unlimited jurisdiction to grant a stay' of the winding up petition. In *Solid Kitchen* too, no reason was given by the learned judge to support his conclusion that 'the stay of winding up petition is specifically provided for under s 222 of the Companies Act 1965'. As we will show shortly, such a conclusion appeared to be against the intention of the Legislature in enacting s 222 of the Act.

[11] The issue whether s 222 of the Act empowered the court to order a stay of the hearing of the winding up petition came up again for consideration by the court in *Shing Hup Construction Sdn Bhd v General Soil*. In that case the respondent company, against whom the winding up petition in question was taken, applied for an order to stay the hearing of the winding up petition until the trial of a civil suit brought by the respondent company against the petitioner company. Learned counsel for the petitioner company raised a preliminary question whether s 222 of the Act empowered the court to order a stay of the winding up petition before it. After hearing full argument, the High Court answered the question in the negative. The court held that what may be applied for and ordered under the section was a stay of further proceedings in the action or proceeding which was also pending, not further proceeding in the winding up petition in question. The court declined to follow the decision in *Solid Kitchen*.

[12] In his judgment Abdul Aziz J (As His Lordship then was) succinctly explained the true scope and application of s 222 of the Act:

> Authorities have been cited on both sides, but I think the question can be answered simply in a proper analysis of the manner in which s 222 is constructed. It says as follows:
>
> > At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.
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> The making of an application under s 222, as represented by the words 'may... apply', is to be done 'At any time after the presentation of a winding up petition and before a winding up order has been made' – that is to say, during the pendency of the winding up petition in question, which in this case is the present winding up petition. That is the time factor. The event or case that gives rise to the need to apply is 'where any action or proceeding against the company is pending', the 'company' there being the company that is sought to be wound up, which in this case is the respondent company. That case or event must, of necessity, also be existing during the time factor, that is to say, during the pendency of the winding up petition in question. Coupling the time factor with the case or event, we have a situation where, during the pendency of the winding up petition in question, there is pending — that is to say, by necessity of logic, also pending — an action or proceeding against the company that is sought to be wound up. The action or proceeding that is also pending must be other than the winding up petition in question, although it may be some other winding up petition. *Now, what may be applied for and ordered under s 222 is a stay of further proceedings in the action or proceeding that is also pending, not further proceedings in the winding up petition in question, which in this case is the present winding up petition.*

> The result is as if the word 'other' had been added to the phrase 'action or proceeding' in s 222, but that word had not been included because, I think, the intention of s 222 is so clear from the way it is constructed that it would have been unprofessional to attempt to enhance the clarity by adding the word.
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> (Emphasis added.)

[13] We agree entirely with him. In our view the use of the words, 'where any action or proceeding against the company is pending', before the words 'apply to the court', and the use of the words 'further proceedings in the action or proceeding' after the word 'restrain' in s 222 of the Act clearly evince the intention of the Legislature to give the court the power to stay further proceedings in action or proceeding (other than) the hearing of the winding up petition in question which is pending before the court. To complete the discussion on this issue, it is also important, in our view, to consider the purpose of giving the court the power of stay as aforesaid. For this, it is useful to consider the period 'at any time after the presentation of a winding up petition and before a winding up order has been made', within which an application may be made for the stay of further proceedings in action or proceeding (other than the hearing of the winding up petition before the court). During this interim period the company may be said to be in limbo. Until the court makes the winding up order, it is not certain that the company will be wound up although the possibility of a winding up order being made is real. In this connection, in *Palmer's Company Law* (24th Ed) at p 1448, on staying proceeding, the learned author made the following observation:

> The object of the winding up provisions of the Companies Act 1862, said Lindley LJ in *Re Oak Pitts Colliery Co*, 'is to put all unsecured creditors upon an equality and to pay them pari passu'. To accomplish this it was indispensable that proceedings against the company by way of action, execution, distress or other process should be suspended; otherwise the winding up would resolve itself into a scramble for the assets.

[14] Thus, the purpose of giving the court the power under s 222 of the Act to stay further proceedings in action or proceeding (other than the hearing of winding up petition pending before the court), is to enable the court to ensure that no creditor shall gain priority over others of his class. In this regard reference may be made to *Bowkett v Fullers United Electric Works Ltd* [1923] 1 KB 160. That case concerns s 140 of the English Companies (Consolidation) Act 1908, which provides:

> At any time after the presentation of a petition for winding up, and before a winding up order has been made, the company, or any creditor or contributory, may —

A (a) where any action or proceeding against the company is pending in the High Court or Court of Appeal in England or Ireland, apply to the Court in which the action or proceeding is pending for a stay of proceedings therein; and

B (b) where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding;

and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

C

[15] In that case after a petition had been presented to wind up the company, the plaintiff issued a writ for 41*l* 2s 6d against the company and obtained judgment and was about to levy execution. The company then took out a summons to stay further proceedings by the plaintiff on the ground that D the petition had been presented and a scheme of arrangement was being proposed for acceptance by the general body of creditors. The question was whether in those circumstances the further proceedings by the plaintiff should be stayed.

E **[16]** In his judgment Bankes LJ said at p 163:

If a petition is presented then under s 140 the court has power to stay or restrain pending actions or proceedings, and in my opinion the court has the same power whether the petition results in a winding up order or in the approval of a scheme of arrangement. The general policy of the court in exercising this jurisdiction, F when a petition has been presented which may result in a winding up order or a scheme, is to secure that no creditor shall thenceforward gain priority over others of his class, and when an application is made to stay proceedings under s 140 very exceptional circumstances must exist to justify the court in refusing to accede to the application, because if the plaintiff's action is not stayed he will get payment G in full while if his action is stayed he will take his place properly among other creditors of his class. I cannot see any exceptional circumstances in the present case. *To allow the plaintiff to proceed would be in effect, during the interval between the presentation of a petition and the working out of a scheme of arrangement, to allow certain creditors to help themselves out of the assets of the company in priority to some* H *others in a less fortunate position.* No doubt the court has a discretion whether it will stay a plaintiff's action, but it is against the policy of the court to exercise that discretion by allowing the plaintiff to proceed except in very special circumstances. Here it ought to be exercised in favour of the application. The appeal must be allowed and the proceedings stayed.

I **[17]** In the same case Scrutton LJ said at p 164:

Furthermore when a petition has been presented power is given by s 140 to the High Court to stay proceedings pending in that court so *as to prevent a scramble by the creditors while the court is considering whether it will wind up the company or*

not, and to insure that all creditors of the same class shall obtain equal terms. If there is no petition to wind up the court cannot stay proceedings on the ground that meetings are being held and in the mere expectation or hope that a petition will be presented; but where a petition has been presented Parliament has given the court power to stay proceedings pending therein.

[18] Section 140 of the Companies (Consolidation) Act 1908, is in pari material with s 226 of the English Companies Act 1948. In *Re Dynamics Corporation of America* [1972] 3 All ER 1046, the companies against which petitions for winding were presented, applied ex parte for an order under s 226(b) of the Companies Act 1948. The facts of the case from the headnotes are as follows. An American company which had been carrying on business in the United Kingdom, and its English subsidiary company, having incurred heavy losses, convened a meeting of the creditors in England and suggested that a moratorium, which had been granted by a New York court, should be extended to include the English creditors, the intention being to bring out a scheme of arrangement so as to enable the American company to be sold as a going concern and the English creditors to be paid, it was hoped, in full. As a result of that meeting the vast majority of the creditors took no further action against the companies, but a small minority commenced proceedings against the companies in Scotland. Petitions were presented in the High Court for the compulsory winding up of both companies, which then applied ex parte for an order under s 226(b) of the Companies Act 1948 that the actions in Scotland be restrained until the winding up orders had been made or the petitions dismissed. The issues arose (i) whether the court had jurisdiction, by virtue of s 226 of the 1948 Act, to make the order sought, and (ii) whether the order would be enforceable in Scotland by virtue of s 276 (1) of the 1948 Act.

[19] In his judgment, Templeman J reffered to the Court of Appeal's decision in *Bowkett v Fullers United Electric Works Ltd*. His Lordship said at pp 1047–1048:

> At any time after the presentation of a winding up petition, and before a winding up order has been made, the company, or any creditor or contributory, may... apply to the court...
>
> The winding up petitions were presented against the American company and the English company in this court on 2 October 1972. Of course, no winding up order has been made and, therefore, the necessary preliminary requisites of s 226 are satisfied. In those circumstances, application may be made.
>
> (a) where any action or proceeding against the company is pending in the High Court or Court of Appeal in England or Northern Ireland... to the court in which the action or proceeding is pending for a stay of proceedings therein...

So far as the creditors have brought actions in the Queen's Bench Division, application under s 226(a) ought to and is being brought in the Queen's Bench Division. Then the section proceeds under (b) to deal with 'any other action or proceeding'. An application may be made in these circumstances:

> where any other action or proceeding is pending against the company... to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding; and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

The present application is made under s 226(b) on the grounds that the actions in Scotland are 'other actions or proceedings' which ought to be restrained.

The general principle is that when a winding up petition has been presented creditors should be restrained from pursuing their remedies in order to avoid their getting an unfair advantage over other creditors. That principle is to be found in *Bowkett v Fullers United Electric Works Ltd*, Bankes LJ said:

> In this case after a petition had been presented to wind up the company, the plaintiff issued a writ for 41*l* 2s 6d against the company and got judgment and was about to levy execution. The company then took out a summons to stay further proceedings by the plaintiff on the ground that the petition had been presented and a scheme of arrangement was being proposed for acceptance by the general body of creditor.

That is the situation in the present case. The American company and the English company desire a moratorium and then intend to bring a scheme of arrangement so as to enable the American company to be sold as a going concern and the creditors to be paid, it is hoped, so far as the English creditors are concerned, in full. Then Bankes LJ went on:

> If a petition is presented... the court has power to stay or restrain pending actions or proceedings, and in my opinion the court has the same power whether the petition results in a winding up order or in the approval of a scheme of arrangement. The general policy of the court in exercising this jurisdiction, when a petition has been presented which may result in a winding up order or a scheme, is to secure that no creditor shall thenceforward gain priority over others of his class, and when an application is made to stay proceedings.... very exceptional circumstances must exist to justify the court in refusing to accede to the application, because if the plaintiff's action is not stayed he will get payment in full while if his action is stayed he will take his place properly among other creditors of his class.

It follows then that I ought to make the order in the absence of exceptional circumstances unless I am precluded from doing so by reason of the fact that the

plaintiffs' actions are brought in Scotland. It is well settled that the Companies Act 1948 is an Act which applies to the whole of the United Kingdom and that, in exercising jurisdiction under the Act, the court should endeavour to make it work as an harmonious whole.

(Emphasis added.)

[20] Eventually, His Lordship held (at p 1050) —

In my judgment, once a petition has been presented everything thereafter is in the course of winding up a company, although it does not necessarily follow that a winding up order will be made at the end of the day. To give any other interpretation would defeat the object of enabling the court, once a winding up petition has been presented, to see that the creditors share rateably in the assets and that one particular creditor is not enabled to jump the gun by taking an enforcement proceeding in any part of the United Kingdom. In these circumstances, I have agreed to make the order under s 226, subject to an amendment, in the terms of the proposed order, which will restrain the plaintiffs in Scotland from taking further proceedings until a winding up order has been made or until the petition shall be otherwise disposed of.

(Emphasis added.)

[21] We are mindful of the fact that our s 222 is not word for word the same as s 226 of the English Companies Act 1948. In the course of his illuminating judgment is *Shing Hup Hin Construction v General Soil Engineering*, the learned judge also made reference to the English s 226 and explained how that section differed from our s 222:

The English s 226 was referred to in submission. It is as follows:

At any time after the presentation of a winding up petition, and before a winding up order has been made, the company, or any creditor or contributory, may —

(a) where any action or proceeding against the company is pending in the High Court or Court of Appeal in England or Northern Ireland, apply to the court in which the action or proceeding is pending for a stay of proceedings therein; and

(b) where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding;

and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

A It is to be noted that the event or case of an action or proceeding being pending against the company is, unlike in our s 222, provided in two paras, (a) and (b), because the application is to be made in different courts, depending on whether the action or proceeding falls under para (a) or (b). Just as in our s 222, the action or proceeding under para (a) is not qualified by the word 'other'. In para (b) however, is it so qualified, but not out of necessity to distinguish it from the winding up petition in question but from the action or proceeding in para (a).

B

[22] Apart from the provision of paras (a) and (b) under the English s 226, which had been explained by the learned judge as aforesaid, that section is C almost similar to s 222 of the Act. We are of the view that the principle, object and reason underlying both provisions are the same. The decisions in *Bowkett v Fullers United Electric* and *Re Dynamics Corporation of America* which we have adverted to, are therefore, very persuasive references in the interpretation of s 222 of the Act.

D

[23] For reasons which we have explained, on the first issue, we conclude that s 222 of the Act does not empower the court to stay the proceeding of the winding up petition before it.

E *Whether the learned judge was right in ordering the winding up of the appellant*

[24] In opposing the petition, the reasons given by the appellant in its affidavit in reply and other affidavits can be summarised as follows:

F 1. Firstly, the judgment debt obtained in Civil Suit No 22–48 of 2005 which formed the basis of the petition, was a summary judgment against which the appellant had filed an appeal and the appeal was pending.

G 2. Secondly, the appellant disputed the judgment debt for the following reasons:

(a) the respondent's claim in Civil Suit No 22–48 of 2005 was based on a loan agreement whereby the respondent had loaned RM700,000 to the appellant;

H

(b) the loan agreement was against public policy and the Contracts Act because the loan was given for the purpose of guaranteeing a contract (the said contract) which was awarded to the respondent by appellant;

I (c) the respondent had failed to furnish the performance bond for the said contract;

(d) the appellant had made a counter claim against the respondent because the works carried out by the latter under the said contract were not according to specification, resulting in the appellant incurring losses of more than RM2m.

3. Thirdly, the respondent averred that it still had not completed a number of housing projects, whereby the number of houses sold was more than 2/3 of the total number of houses in the said project. the respondent had, in Civil Suit 22–497 of 2005, obtained an injunction restraining the appellant from continuing works in the said project. The appellant contended that in the circumstances it would not be just and equitable for the appellant to be wound up.

4. Fourthly, the appellant averred that it was solvent, relying on a bank statement (at p 204 of the appeal record) which showed that as on 28 February 2006 there was RM537,311.55 in its account in Maybank.

[25] Regarding the first ground advanced by the appellant [that the judgment debt was summary judgment], the learned judge in the court below held:

> The fact that petition for winding up (encl 2) was taken based on a summary judgment which is on appeal is not a good ground to justify dismissing the petition for winding up.
>
> The judgment dated 7 July 2005 in Civil Suit No 22–48 of 2005 (exh AA) was regularly obtained. A judgment remains a regular and enforceable until it is set aside by the court. Although the respondent had filed an appeal against the judgment, the judgment remains a good judgment until it is set aside on appeal. Until the judgment is set aside, the claim by petitioner based on the said judgment cannot be regarded as a bona fide disputed debt. The fact that respondent had lodged an appeal against the judgment merely means that he still disputed the debt but does not establish that the debt is bona fide disputed. The judgment has already established the contrary (see decision of Wan Adnan Ismail J (as he then was) in *Patel Holding Sdn Bhd v Estet Pekebun Kecil Sdn Bhd & Anor* [1990] 2 CLJ 280 and *Bank Utama Malaysia Bhd v GKM Amal Bhd* [2000] 5 MLJ 657).

[26] We agree with him.

[27] On the second reason given by the appellant, we find that what it actually did was to show that the summary judgment in Civil Suit No 22–48 of 2005 should not have be entered because there were triable issues. In dealing with this point the learned judge held:

> Going through the affidavit, it is my view that what the respondent tried to do was to show that the summary judgment dated 7 July 2005 ought not to have been entered because there are triable issues. This I think should not be allowed. As I have said earlier in this judgment, the said summary judgment is a good judgment unless set aside on appeal. Winding up proceeding can proceed until the judgment is set aside or it can be shown that the judgment was obtained by fraud or collusion. In this case there is no allegation let alone evidence to show that the said judgment was obtained by fraud or collusion. Therefore it is not open to respondent to go behind the decision and re-submit that there was triable issue in the plaintiff claim for RM700,000 (claim in Civil Suit 22–48 of 2005).

[28] We are satisfied that the learned judge had not misdirected himself in arriving at the aforesaid decision. The issues raised in the appellant's affidavit are triable issues for the consideration of the court when it deals with the appellant's appeal against the order granting the summary judgment in Civil Suit No 22–48 of 2005. The court in which the winding up petition is filed should not go behind the judgment unless there is evidence to show that the judgment was obtained by fraud or collusion (see *Banfoong Sydney (JM) Sdn Bhd v MIFC Credit & Leasing Sdn Bhd* [1990] 2 MLJ 120, at p 122 and *Quantum Far East (M) Sdn Bhd* [2004] 7 MLJ 507). Having considered the appeal record in this case we find nothing to show that the judgment was irregularly obtained or that the same was obtained by fraud or collusion.

[29] On the third ground advanced by the appellant — that it still had not completed a number of housing projects undertaken by it, the respondent's reply in its affidavits was that two housing projects undertaken by the appellant, namely the Taman Mengkuang Heights project and the Taman Orkid project were abandoned before the appellant was wound up because of financial difficulties. In respect of the Taman Orkid project, the respondent averred that Bank Islam Malaysia Bhd had granted facilities of RM2,945,788 to the appellant for the project but the appellant failed to pay the monthly instalments. Only about 10 out of the total 71 houses had been sold. On 3 January 2006, Bank Islam Malaysia Bhd commenced Civil Suit No 22–2 of 2006 claiming from the appellant, RM2,198,152.95, the amount due as on 18 November 2005. The appellant's reply was that the loan from Bank Islam Malaysia Bhd was in the process of being restructured:

> Pinjaman dengan Bank Islam kini dalam proses pengstrukturan semula dan ini bukan urusan pempetisyen. Berapa unit rumah yang dijual juga bukan urusan pempetisyen.

[30] Regarding the Taman Mengkuang Heights project, the respondent said that the appellant had failed to settle the interim Progressive Certificates No 7 to 10 issued by its own architect in favour of the respondent amounting to RM632,425.56 for the said project. The respondent had filed Civil Suit No 22–140 of 2005 in the Penang High Court. Further, the respondent said that in respect of the said project, the appellant had collected RM4.2m paid by purchasers for 31 units of bungalows in Taman Mengkuang Heights. However, according to the respondent, in breach of the Housing Developers (Housing Development Account) Regulations 1991, the appellant failed or neglected to deposit the said amount in the housing developers' account at the Malayan Banking Bhd, KOMTAR Branch, Penang. Instead, the appellant converted the moneys received for its own use. The appellant did not deny the averment made by the respondent. Instead, it gave the following reply:

> Berkaitan perenggan 5(c) pula, berikut adalah jawapan responden:
>
> (i) Apa-apa perkara berkaitan tuntutan RM632,425.56 tersebut adalah berkaitan Guaman Sivil 22–140–2005 dan responden tidak perlu berhujah meleretkan perkara itu di sini;
>
> (ii) Responden tidak perlu menjawab berkaitan akaun pemaju perumahan kerana ianya perkara dalam responden. Apa-apa tindakan adalah di antara responden dan juga Pengarah-pengarah terdahulu yang bertanggungjawab.

[31] We find that the third ground raised by the appellant could not assist the appellant in this appeal. In this case the fact is that the respondent had served on the appellant a notice under s 218 of the Act demanding payment of RM812,191.78 within 21 days from the date of service of the notice. The said period of 21 days had lapsed but the appellant did not pay the sum demanded. In such a case the presumption of insolvency arose and it was for the appellant prove that it was able to pay its debt. In this regard, in *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313, at p 320, Gunn Chit Tuan SCJ delivering the judgment of the Supreme Court said:

> In this case, the presumption of insolvency arises when the requirements of s 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with 'commercial insolvency', that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the *Malaysian Plant* case and cite the following observations from Buckley on the Companies Act (13th Ed) at p 460:

> *In such a case it is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.*
>
> (Emphasis added.)

[32] This takes us back to the bank statement at p 204 of the appeal record which was relied upon by the appellant to contend that it was solvent. The respondent's reply was that according to the affidavits filed by the appellant in Civil Suit No 22–48 of 2005, the amount RM537,311.55 in the appellant's office account No 50705–9517999 in Maybank as shown in the statement of account at p 204 of the appeal record, was not owned by the appellant, but was part of the RM2m loan obtained from the Jabatan Pembangunan Koperasi Malaysia, and the purpose of the loan was to finance the project of building 71 units of bungalow houses at Taman Orkid. According to the respondent, the said amount of RM537,311.55 should have been put in the appellant's Akaun Pemajuan Perumahan No 5-57054-50084, not in the appellant's office account. The appellant did not deny that the money was not its money. Instead, it said that since the money belonged to Jabatan Pembangunan Koperasi Malaysia for the purpose of the Taman Orkid project, the money was wrongly attached by the respondent:

> Perenggan 9 dirujuk dan responden menegaskan bahawa memandangkan pempetisyen sendiri telah dengan jelas dan nyata mengakui bahawa wang dalam akaun yang di 'garnish' tersebut adalah kepunyaan Jabatan Koperasi Malaysia dan bahawa ianya untuk Taman Orkid, oleh itu wang tersebut telah dengan salahnya ditahan oleh pempetisyen.

[33] The respondent's response was that because the money was in the appellant's office account, the respondent was entitled to garnish the amount to satisfy the judgment it obtained against the appellant on 7 July 2005.

[34] Since the appellant had admitted that the money in its office account as shown in the statement of account at p 204 of the appeal record, belonged to the Jabatan Pembangunan Koperasi Malaysia, we do not see how the appellant could use the existence of that sum of money to satisfy the court that it was commercially solvent as explained by the Supreme Court in *Sri Hartamas*. We conclude that on the affidavit evidence available before us, there is nothing to prove that the appellant was able to pay its debt. We therefore hold that the learned judge of the High Court had exercised his discretion correctly in ordering the appellant to be wound up.

[35] In the result we dismissed the appeal with costs. Deposit to the respondent towards the account of taxed costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon